Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 25 APRIL 10, 1991 No. 15

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 91-27)

EXTENSION OF ANALYSES FOR WHICH E.W. SAYBOLT & CO., INC., A CUSTOMS ACCREDITED COMMERCIAL LABORATORY, HAS BEEN ACCREDITED TO PERFORM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of additional analyses for which E.W. Saybolt & Co., Inc., a Customs accredited commercial laboratory, has been accredited to perform.

SUMMARY: E.W. Saybolt & Co., Inc., of Kenilworth, New Jersey, a Customs accredited commercial laboratory under § 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of their commercial laboratory accreditation in certain laboratories to include the following analyses: Reid Vapor Pressure, Saybolt Universal Viscosity, percent by weight sulfur of petroleum products, percent by weight lead in gasoline and sediment by extraction.

SUPPLEMENTARY INFORMATION:

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses for certain products from Customs accredited commercial laboratories. E.W. Saybolt & Co., Inc., which holds Customs accreditation in certain laboratory analyses, has applied to Customs to extend its accreditation to the performance of additional analyses in some of its laboratories. Review of E.W. Saybolt & Co., Inc. qualifications shows that the extension is warranted and, accordingly, has been granted. The extension, however, is limited to the analytical capabilities of each site.

EFFECTIVE DATE: March 18, 1991.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave. NW, Washington, D.C. 20229 (202-566-2446).

Dated: March 22, 1991.

J.E. HARRELL,
Acting Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, March 28, 1991 (56 FR 12973)]

19 CFR Part 4

(T.D. 91-28)

COASTWISE TRANSPORTATION OF CERTAIN ARTICLES BY VESSELS OF THE STATE OF BAHRAIN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include the State of Bahrain in the lists of nations which permit vessels of the United States to transport certain articles specified in section 27, Merchant Marine Act of 1920, as amended, between their ports. This amendment will provide reciprocal treatment for vessels of Bahrain registry. Customs has been furnished with satisfactory evidence that the State of Bahrain places no restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country.

DATES: The reciprocal privileges for vessels registered in the State of Bahrain became effective on November 27, 1990. This amendment is effective April 2, 1991.

FOR FURTHER INFORMATION CONTACT: Jeffrey Whalen, Carrier Rulings Branch (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

Section 27 of the Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), referred to as the Jones Act, provides that no merchandise shall be transported between points in the United States embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by citizens of the United States. The sixth proviso of the Act, as amended, exempts from the provisions of section 883, upon a finding by the Secretary of the Treasury pursuant to information obtained and furnished by the Secretary of State, that where a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the United States, reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the United States will not apply to its vessels.

In accordance with the Act, the Customs Service has listed in § 4.93(b)(1) of the Customs Regulations (19 CFR 4.93(b)(1)) those nations found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Those nations found to grant reciprocal privileges to vessels of the United States for the transportation of equipment for use

with cargo vans, lift vans, and shipping tanks; empty barges specifically designed for carriage aboard a vessel; empty instruments of international traffic; and certain stevedoring equipment and material are listed in § 4.93(b)(2) of the Customs Regulations (19 CFR 4.93(b)(2)).

The Department of State advised the Chief, Carriers Rulings Branch, Customs Service, on November 27, 1990, that the State of Bahrain places no restrictions on the transportation of articles listed in the Act by vessels of the United States between ports in the State of Bahrain. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations and Disclosure Law Branch.

Finding

Pursuant to the information received from the Department of State, it has been found that the State of Bahrain places no restrictions on the transportation of the articles specified in section 27 of the Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), by vessels of the United States. Therefore, the appropriate reciprocal privileges are being accorded to vessels of Bahrain registry as of November 27, 1990.

Inapplicability of Notice and Delayed Effective Date Provisions

Because this amendment merely implements a statutory requirement and involves a matter in which the public is not particularly interested, pursuant to 5 U.S.C. (b)(3)(B), notice and public procedure thereon are unnecessary. Similarly, good cause exists for dispensing with a delayed effective date under 5 U.S.C. (d)(1).

Executive Order 12291 and Regulatory Flexibility Act

In that this amendment does not meet the criteria for a "major rule" within the meaning of Executive Order 12291, Customs has not prepared a regulatory impact analysis. Inasmuch as a notice of proposed rulemaking is not required for this final regulation, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) do not apply.

Drafting Information

The principal author of this document was Michael Smith, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, Cargo vessels, Coastwise trade, Maritime carriers, Vessels.

Amendment to the Customs Regulations

To reflect the reciprocal privileges granted to vessels registered in the State of Bahrain, Part 4, Customs Regulations (19 CFR Part 4), is amended as follows:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADE

1. The authority for Part 4 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

* * * * * * *

§ 4.93 also issued under 19 U.S.C. 1322(a), 46 U.S.C. App. 883;

* * * * * * *

§ 4.93 [Amended]

2. Section 4.93(b)(1) and (2), are amended by adding "Bahrain" in appropriate alphabetical order to the lists of countries under those sections.

Dated: March 26, 1991.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch.

[Published in the Federal Register, April 2, 1991 (56 FR 13394)]

U.S. Customs Service

General Notice

19 CFR 141.36 and 141.37

NONRESIDENT POWERS OF ATTORNEY

Headquarters has received a number of questions regarding nonresident powers of attorney. The following letter addresses many of those questions and is, therefore, being published for the information of customs brokers and other interested parties.

The letter follows:

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 7, 1991.

MR. W.T. EASON
IMPORT MANAGER
W.M. STONE & CO., INC.
838 Granby Street
Norfolk, Virginia 23514

DEAR MR. EASON:

This is in response to your letter of February 5, 1991, with questions concerning corporate certifications of nonresident corporations (corporations chartered outside the, U.S. or U.S. Virgin Islands).

Your first question was that since corporate certifications are not required for resident corporations, are they still required for nonresident corporations (19 CFR 141.31 not withstanding). The answer is: Yes, they are. The reason is that resident corporation's officers are on file in the U.S. and the corporation is subject to U.S. jurisdiction, while a nonresident corporation's are not.

Your second and third question dealt with the documentation a Customs Broker with authority to designate other brokers as agent for a nonresident corporation must provide the other brokers. You ask whether the other brokers must be authorized to accept service of process against the nonresident corporation, and whether they must also be provided with the corporate certification. The answer to these questions is: Yes. Any broker acting as agent for a nonresident corporation must be authorized in accordance with 19 CFR 141.36 to accept service. As to whether a corporate certification must be provided: It must be provided unless the nonresident corporation is authorized to conduct business in the state in which the Customs District where the broker does business is located (19 CFR 141.37).

Please let me know if we can be of further assistance to you.

Sincerely,
VICTOR G. WEEREN,
Director,
Office of Trade Operations.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 91-18)

CENTRAL SOYA CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-07-00575

On Cross Motions For Summary Judgment

Plaintiff contends that the Customs Service acted illegally by denying plaintiff substitution same condition drawback, pursuant to 19 U.S.C. § 1313(j)(2), on the ground that plaintiff was not the exporter of the substituted merchandise. Defendant contends that Customs' decision to deny drawback is supported by statute and by Customs regulations enacted according to law. Plaintiff moves for summary judgment. Defendant opposes plaintiff's motion and cross-moves for summary judgment.

Held: Since, in enacting 19 U.S.C. § 1313(j)(2), Congress did not intend to require that the claimant of substitution same condition drawback be the exporter of the substituted merchandise, it is the conclusion of the court that Customs acted illegally in denying the plaintiff drawback. Since it is not disputed that plaintiff has satisfied the other requirements for drawback, the plaintiff is entitled to drawback. Accordingly, plaintiff's motion is granted, and defendant's cross-motion is denied.

[Plaintiff's motion granted; Defendant's cross-motion denied.]

(Dated March 20, 1991)

Soller, Shayne & Horn, (*Carl R. Soller* and *Margaret H. Sachter*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Al J. Daniel, Jr.*) and (*Chi Choy,* United States Customs Service, of Counsel), for defendant.

Thompson, Hine and Flory, (*Lewe B. Martin, Peter A. Greene,* and *Frank P. Cihlar*), for *amicus curiae* B.F. Goodrich Company.

Paul, Weiss, Rifkind, Wharton & Garrison, (*Robert E. Montgomery, Jr., George Kleinfeld,* and *Richard S. Taylor*), for *amicus curiae* Congressman Bill Frenzel.

Neville, Peterson & Williams, (*John M. Peterson* and *Peter J. Allen*), for *amicus curiae* Uniroyal Chemical Company.

RE, *Chief Judge*: The question presented in this case pertains to the plaintiff-importer's entitlement to a drawback, or refund, pursuant to 19 U.S.C. § 1313(j)(2), on customs duties paid on imported merchandise when, within three years of the importation, substitute fungible goods are exported in the same condition as the imported goods. The drawback, or refund, authorized pursuant to this statute and the customs regulations promulgated thereunder, is referred to in customs law as a "substitution same condition drawback."

Plaintiff, Central Soya Company, Inc., the importer of certain crude degummed soybean oil, entered into a contract with the Bunge Corporation for an amount of similar crude oil. Since the imported crude oil had

already undergone processing, plaintiff performed its contract with Bunge by sending domestic crude degummed soybean oil. The domestic crude oil was delivered to Bunge, and, pursuant to a contract between Bunge and a foreign corporation, was then exported. Plaintiff then sought substitution same condition drawback for the exported crude oil. Plaintiff's request was denied by Customs on the ground that plaintiff was not the exporter of the crude oil.

In this action, the plaintiff contends that the Customs Service acted illegally in denying drawback. The defendant contends that 19 U.S.C. § 1313(j)(2), read in the light of its legislative history, requires that the drawback claimant must be the exporter of the substituted merchandise.

The question presented is whether the Customs Service acted illegally in denying the plaintiff substitution same condition drawback, pursuant to 19 U.S.C. § 1313(j)(2), on the ground that the plaintiff was not the exporter of the substituted merchandise.

Since, in enacting 19 U.S.C. § 1313(j)(2), Congress did not intend to require that the claimant of substitution same condition drawback be the exporter of the substituted merchandise, it is the conclusion of the court that Customs acted illegally in denying the plaintiff the requested drawback. Since it is not disputed that the plaintiff has satisfied the other requirements for drawback, the plaintiff is entitled to drawback. Accordingly, the plaintiff's motion for summary judgment is granted, and the defendant's cross-motion is denied.

Background

1. *Factual Background:*

Both parties submitted statements of material facts as to which there is no genuine dispute. The plaintiff, Central Soya Company, Inc., imported 5,988,540 lbs. of crude degummed soybean oil, between May 11 and May 29, 1985. Upon entry, the crude oil was processed by the plaintiff to produce refined soybean oil.

On June 25, 1985, the plaintiff entered into a contract with the Bunge Corporation, agreeing to supply Bunge with 2,817,621 lbs. of crude degummed soybean oil. Since plaintiff had already processed the imported crude oil, it performed its contract with Bunge by delivering to Bunge 2,817,621 lbs. of domestic crude degummed soybean oil. Pursuant to a contract between it and a foreign corporation, Bunge then exported the domestic crude oil.

On June 25, 1985, pursuant to 19 U.S.C. § 1313(j)(2), the plaintiff filed its request with the Customs Service for substitution same condition drawback of duties, for 2,817,621 lbs. of crude degummed soybean oil. As part of its claim for drawback, the plaintiff submitted a statement by Bunge, in favor of the plaintiff, in which Bunge disclaimed any right to drawback for the exported crude oil.

In 21 Cust. Bull. 365, C.S.D. 87-6 (1987), the Customs Service denied the plaintiff's claim for drawback. The Customs Service first deter-

mined that, for purposes of 19 U.S.C. § 1313(j)(2), the exported domestic crude oil was "fungible" with the imported crude oil. *See id.* at 366.

The Customs Service then considered whether the drawback claimant must be in possession of the substituted merchandise, and quoted language from the legislative history of 19 U.S.C. § 1313(j)(2). Specifically, the Customs Service quoted language from the House of Representatives Report No. 98-1015, which stated that:

> "Drawback is provided *if the same person requesting drawback*, subsequent to importation and within three years of importation of the merchandise, *exports from the United States* or destroys under Customs supervision fungible merchandise (whether imported or domestic) which is commercially identical to the merchandise imported."

Id. at 366-67 (quoting H.R. Rep. No. 1015, 98th Cong., 2d Sess. 64, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5023) (emphasis in original). The Customs Service reasoned that "[t]o qualify for drawback under this provision of law, the exporter must be in possession of the substituted merchandise at the time of exportation and the exporter is also the legal entity that must satisfy the other possession requirement for the imported duty-paid merchancise designated for payment of drawback." *Id.* at 366.

The plaintiff then brought this action, contending that the Customs Service exceeded its statutory authority, and had illegally denied the plaintiff substitution same condition drawback. The defendant contends that Customs did not exceed its authority, since 19 U.S.C. § 1313(j)(2), read in the light of its legislative history, requires that the drawback claimant must be the exporter of the substituted merchandise. Plaintiff moved for summary judgment, and defendant cross-moved for summary judgment.

2. *Statutory History of Substitution Same Condition Drawback:*

A. *Drawback of Duties:*

The first customs laws enacted by the United States Congress provided for an importer to obtain a drawback of duties. Section 3 of the Act of July 4, 1789, provided that:

> all the duties paid, or secured to be paid upon any of the goods, wares and merchandises as aforesaid, except on distilled spirits, other than brandy and geneva, shall be returned or discharged upon such of the said goods, wares, or merchandises, as shall within twelve months after payment made, or security given, be exported to any country without the limits of the United States, as settled by the late treaty of peace; except one per centum on the amount of the said duties, in consideration of the expense which shall have accrued by the entry and safe-keeping thereof.

Act of July 4, 1789, ch. 2, § 3, 1 Stat. 24, 26-27.

In 1874, when the statutes enacted by Congress were codified into the Revised Statutes of the United States, an importer's entitlement to a drawback was provided for in section 3015. The statute however, lim-

ited drawback to duties paid on merchandise that is imported, and subsequently "exported to any foreign port other than the dominions of any foreign state immediately adjoining to the United States. * * *"

A further limitation on an importer's entitlement to drawback was contained in the Tariff Act of 1930. Section 313 of the Act provided for drawback for duties paid on imported merchandise only if the imported merchandise was used in the manufacture of exported merchandise. In pertinent part, section 313(a) provided that "[u]pon the exportation of articles manufactured or produced in the United States with the use of imported merchandise, the full amount of the duties paid upon the merchandise so used shall be refunded as drawback, less 1 per centum of such duties. * * *" Tariff Act of 1930, ch. 497, § 313(a), 46 Stat. 590, 693. Section 313(a) was codified at 19 U.S.C. § 1313(a).

In 1980, Congress expanded the entitlement to drawback by amending the drawback statute to provide for "same condition drawback," or drawback paid on imported merchandise that is subsequently exported without being manufactured. See Act of Dec. 28, 1980, Pub. L. No. 96-609, § 201(a), 94 Stat. 3555, 3560. Section 201(a), which was codified at 19 U.S.C. § 1313(j), provided that:

> (j) SAME CONDITION DRAWBACK—(1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation—
>
> (A) is, before the close of the three-year period beginning on the date of importation—
>
> (i) exported in the same condition as when imported, or
>
> (ii) destroyed under Customs supervision; and
>
> (B) is not used within the United States before such exportation or destruction;
>
> then upon such exportation or destruction 99 per centum of the amount of each such duty, tax, and fee so paid shall be refunded as drawback.
>
> (2) The performing of incidental operations (including, but not limited to, testing, cleaning, repacking, and inspecting) on the imported merchandise itself, not amounting to manufacture or production for drawback purposes under the preceding provisions of this section, shall not be treated as a use of that merchandise for purposes of applying paragraph (1)(B).

B. *Substitution Same Condition Drawback:*

On May 26, 1983, Congressman Bill Frenzel introduced House of Representatives Bill 3157 (H.R. 3157), the first version of the substitution same condition drawback law. H.R. 3157, which was to be codified at 19 U.S.C. § 1313(j)(2), allowed for drawback, with certain limitations, on "merchandise of the same kind and quality as imported merchandise upon which was paid any duty, tax, or fee because of such importation. * * *" H.R. 3157, 98th Cong., 1st Sess. (1983). H.R. 3157, which was not enacted into law, did not provide any limitations on who would be eligible or entitled to claim drawback.

On November 4, 1983, Congressman Frenzel introduced House of Representatives Bill 4316 (H.R. 4316), which was described by Congressman Frenzel as "a revised version of H.R. 3157." This "revised version" required that the imported merchandise must have "been inported by a person prior to the subsequent exportation by the same person of such commercially identical merchandise. * * *" H.R. 4316, 98th Cong., 1st Sess. (1983).

In his introductory remarks, Congressman Frenzel specifically stated that H.R. 4316 requires that "import and export must be made by the same person." In addition, in its report on H.R. 4316, the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives commented that:

> Drawback is provided if the same person requesting drawback, subsequent to importation and within three years of importation of the merchandise, exports from the United States or destroys under Customs supervision fungible merchandise (whether imported or domestic) which is commercially identical to the merchandise imported.

Subcomm. on Trade of the Comm. on Ways and Means of the House of Reps., 98th Cong., 2d Sess., Report on Miscellaneous Tariff and Customs Bills 67 (Comm. Print 1984).

H.R. 4316, however, was never passed by the House. Instead, on September 18, 1984, the House passed House of Representatives Bill 6064 (H.R. 6064). Section 201 of H.R. 6064, which provided for substitution same condition drawback, did not require that the drawback claimant be the exporter of the substituted merchandise. Rather, section 201 of H.R. 6064 stated that, "before [the] exportation or destruction" of the imported merchandise, the merchandise must be "in the possession of the party claiming drawback under this paragraph. * * *" H.R. 6064, 98th Cong., 2d Sess. (1984).

The Senate did not pass H.R. 6064. On September 20, 1984, the Senate passed House of Representatives Bill 3398 (H.R. 3398), which contained a provision for substitution same condition drawback in section 208. As passed by the Senate, section 208 of H.R. 3398 required that the drawback claimant be the exporter of the substituted merchandise. On October 3, 1984, the House voted to amend H.R. 3398, so that it required only that the drawback claimant have been "in possession" of the substituted merchandise.

Subsequently, a Conference Committee of the House and Senate recommended the enactment of H.R. 3398. As recommended, H.R. 3398 contained section 202, which simply provided that the drawback claimant must have been "in possession" of the substituted merchandise. In its report, however, the Conference Committee followed the language used in House of Representatives report 981015, and stated that section 202:

> [a]mends section 313(j) of the Tariff Act of 1930 to provide drawback if the same person requesting drawback, subsequent to impor-

> tant [sic] and within three years of importation of the merchandise, exports from the United States or destroys under Customs supervision fungible merchandise (whether imported or domestic) which is commercially identical to the merchandise imported.

H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 124-25 (1984) (Conference Report). The language is identical to the language used by the House Subcommittee on Trade in its report on the earlier bill H.R. 4316. H.R. 4316 expressly provided that only the exporter of the substituted merchandise was entitled to substitution same condition drawback.

After its recommendation by the Conference Committee, H.R. 3398 was enacted into law as the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984). Section 202 of the Act, the statutory provision governing substitution same condition drawback, was codified at section 1313(j)(2) of title 19. Section 1313(j)(2) provide, that:

> (2) If there is, with respect to *imported merchandise on which was paid any duty*, tax, or fee imposed under Federal law because of its importation, *any other merchandise* (whether imported or domestic) that—
>
> (A) *is funaible with such imported merchandise*;
> (B) is, before the close of the three-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under Customs supervision;
> (C) *before such exportation or destruction*—
>
> (i) is not used within the United States, and
> (ii) *is in the possession of the party claiming drawback* under this paragraph; and
>
> (D) is in the same condition at the time of exportation or destruction as was the imported merchandise at the time of its importation; then *upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback*, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

19 U.S.C. § 1313(j)(2) (1988) (emphasis added).

Discussion

In the process of administering a statute, it is clear that an administrative agency must interpret the statute, and within the statutory guidelines set by Congress, may set policy and establish rules. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Hence, in cases which deal with the interpretation of statutes administered by an administrative agency, if the court determines that "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. * * *" *Id.* Rather, the agency's interpretation is entitled to deference, and the court must consider whether the interpretation of the

administrative agency "is based on a permissible construction of the statute." *Id.*

Despite its statements according substantial deference to the actions of an administrative agency, the Supreme Court in *Chevron* recognized that on judicial review a court must first consider "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. The Court expressly noted that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The *Chevron* Court further stated that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

As has been often noted, a reviewing court begins "with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In support of its motion for summary judgment, the plaintiff contends that section 1313(j)(2) "sets one requirement as to the party claiming substitution same condition drawback, namely that the claimant must have had possession of the fungible substituted merchandise." The plaintiff submits that section 1313(j)(2) clearly does not require that the claimant have possession of the substituted merchandise at the time of exportation, as required by the Customs Service.

On its cross-motion for summary judgment, the defendant contends that "the Customs Service's regulations and rulings—which require that the person claiming substitution same condition drawback be in possession of and export the substituted merchandise—are reasonable, consistent with the statute and its legislative history and must be followed in this case."

It cannot be disputed that, as noted by the plaintiff, section 1313(j)(2) does not expressly require that the drawback claimant be in possession of the substituted merchandise *at the time of exportation*. The statute simply requires that "before [the] exportation or destruction," the exported merchandise be "in the possession of the party claiming drawback." Hence, the language of section 1313(j)(2) itself indicates that Congress did not intend to require that the claimant of substitution same condition drawback must be in possession of the substituted merchandise at the time of exportation, or must be the exporter of the substituted merchandise.

The defendant, however, contends that the legislative history of section 1313(j)(2) "authorizes the payment of substitution same condition drawback only to the exporter of the substituted merchandise who also possessed the imported duty-paid goods upon which the drawback claim is based." In support of its contention, the defendant cites language from H.R. Rep. 98-1015, the House Report to the Trade and Tariff Act of 1984, which stated that "[d]rawback is provided if the same person re-

questing drawback * * * exports from the United States * * * fungible merchandise. * * *" H.R. Rep. No. 1015, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5023. This language was adopted by the Conference Committee in its statement recommending the enactment of H.R. 3398.

The statement from the Conference Report appears to indicate that, in enacting section 1313(j)(2), Congress intended to require that the claimant of substitution same condition drawback be the exporter of the substituted merchandise. The plaintiff, however, argues that this statement from the Conference Report does not accurately reflect the intent of Congress in enacting the substitution same condition drawback law. The plaintiff contends that, prior to the enactment, Congress rejected other versions of the law which would have provided that substitution same condition drawback could only be claimed by the exporter of the substituted merchandise.

Specifically, the plaintiff notes that H.R. 4316 stated that drawback could be made on merchandise "which has been imported by a person prior to the subsequent exportation by the same person of * * * commercially identical merchandise. * * *" In H.R. 6064, a successor to H.R. 4316, Congress amended the substitution same condition drawback provision to require only that before the exportation of the substituted merchandise, the substituted merchandise must be "in the possession of the party claiming drawback. * * *"

In H.R. 3398, a successor to H.R. 6064, the Senate passed a substitution same condition drawback statute providing that the drawback claimant must be the exporter of the substituted merchandise. Nevertheless, at the Conference Committee, a Joint Committee of the House and Senate recommended a version of H.R. 3398 which contained a substitution same condition drawback law that required only that the substituted merchandise must have been "in the possession of the party claiming drawback. * * *" H.R. 3398 was enacted into law, as the Trade and Tariff Act of 1984. The statement contained in the Committee Report and cited by the defendant, however, is identical to the language contained in the Report of the House Subcommittee on Trade in its report on H.R. 4316, the prior House bill which expressly required that the imported merchandise must have "been imported by a person prior to subsequent exportation by the same person of such commercially identical merchandise. * * *"

Referring to the language contained in the Committee Report, the plaintiff stresses that "[t]he language on which Customs relies for its administration of this portion of the drawback law was not drafted for the text that Customs claims it interprets[.]"

In support of its position, the plaintiff refers to a letter of December 2, 1987, from Congressman Frenzel to a Deputy Commissioner of Customs, concerning Customs' administration of the substitution same condition drawback law. In the letter, which was written in response to the Customs Service ruling in this case, Congressman Frenzel stated

that "my intention as the author of the law was not to limit receipt of substitution same condition drawback duties to the actual exporter of the product." Noting Customs' reliance on the quoted language from the Committee Report in its decision, Congressman Frenzel stated that Customs:

> based [its] ruling on a statement in the committee report which does not accurately interpret the law, in my opinion. As the author, I should have caught the error, but, since this bill was one of many continued [sic] in a package, I did rely on the majority staff for committee report language.

Regardless of whether the Conference Committee erred in its inclusion of the language in the Committee Report, it is evident from a review of the legislative history that, on more than one occasion, Congress rejected bills which expressly required that the person claiming substitution same condition drawback be the exporter of the substituted merchandise. Surely, it cannot be said that the legislative history is a model of clarity that resolves the question of statutory interpretation presented. The legislative history reveals several views that were suggested and considered as to the requirements that would qualify a party for substitution same condition drawback. What is clear is that Congress did not enact into law the requirement now submitted by the defendant, that in order to qualify for drawback under section 1313(j)(2), the claimant must also be the exporter of the substituted merchandise. It is beyond question that the pertinent statutory provision merely states that "before the close of the three-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under Customs supervision[,]" the substituted merchandise must be "in the possession of the party claiming drawback under this paragraph. * * *" 19 U.S.C. § 1313(j)(2) (1988).

The Supreme Court has noted that "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)). Hence, in this case, the court cannot agree with the position urged by the defendant, and concludes that the legislative history indicates that Congress did not intend to require that the claimant of substitution same condition drawback must be the exporter of the substituted merchandise.

Nevertheless, in support of its argument, the defendant notes that Congress expressly granted the Secretary of the Treasury authority for "the designation of the person to whom any refund or payment of drawback shall be made." 19 U.S.C. § 1313 (1) (1988). In its reply brief, the defendant submits that in 19 U.S.C. § 1313 (1), Congress granted the Secretary of the Treasury "an extraordinarily broad mandate, not just to issue regulations consistent with the terms of the act, a phrase which

Congress sometimes employs, but to 'prescribe' substantive rules regarding specific subjects, which include 'the designation of the person to whom any refund or payment of drawback shall be made.'"

In support of its position, the defendant cites *Haig v. Agee*, 453 U.S. 280 (1981), and *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973). Both these cases may be distinguished, however, and, hence, we reject the defendant's contention that, in this case, the Customs Service has "an extraordinarily broad mandate" to interpret section 1313(j)(2).

In *Haig*, a case which dealt with the delegated authority of the Secretary of State to revoke a passport for reasons of national security and foreign policy, the Court stated that "[i]t is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes." 453 U.S. at 290. In *Haig*, however, the Court specifically noted the special area in which Congress had delegated power to an administrative agency in that case. *See id.* at 291-92. The Court stated that when Congress delegates power to an administrative agency in the area of foreign policy and national security, it "'must of necessity paint with a brush broader than that it customarily wields in domestic areas.'" *Id.* at 292 (emphasis omitted) (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)).

The *Mourning* case, which was also cited by the defendant, pertained to the delegated authority of the Federal Reserve Board to combat unfair consumer credit transactions. In *Mourning*, the Supreme Court determined that, under the pertinent statute, Congress had granted broad power to the agency. *See* 411 U.S. at 365-66. *Mourning* dealt with remedial legislation in which the agency needed to adapt to changing circumstances in order to fulfill its role under the statute. As noted by the Court in *Mourning*, "[w]hatever legislation was passed had to deal not only with the myriad forms in which credit transactions then occurred, but also with those which would be devised in the future." *Id.* at 365.

It is clear that neither the statutory language nor its legislative history supports Customs' requirement that the claimant of substitution same condition drawback must be the exporter of the substituted merchandise. Hence, Customs has acted illegally in requiring that the claimant of substitution same condition drawback be the exporter of the substituted merchandise, and has exceeded its statutory authority in denying plaintiff drawback in this case.

Furthermore, not only is Customs' administration of substitution same condition drawback in violation of section 1313(j)(2) and in excess of Customs' statutory authority, but it is doubtful whether the Customs regulations themselves on substitution same condition drawback support Customs' actions in this case. For example, Customs Regulation 191.141(h), which is contained in subpart N, provides that:

> If legal person X possesses imported merchandise (the designated merchandise) during some time interval in period A (defined below) and also possesses other merchandise fungible with it (the substituted merchandise) during the same or different time inter-

val in period A, then 99 percent of the duty paid on the designated merchandise will be refunded as drawback, provided that:

(1) The designated merchandise was in the same condition as imported either at the time of substitution, the time X used it in manufacturing, or at the time X transferred it to another person, whichever occurs first;

(2) The substituted merchandise is in the same condition when exported or destroyed under Customs supervision as was the designated merchandise when imported;

(3) X does not issue a certificate of delivery covering the designated merchandise nor a certificate of manufacture and delivery covering articles manufactured or produced therefrom; and

(4) X maintains records to establish requirements, (1), (2), and (3) of this section and also complies with all relevant requirements of § 191.141 (a) through (g) of this chapter.

Period A (referred to above) begins when X receives the merchandise and ends three years after the importation of said merchandise.

19 C.F.R. § 191.141(h) (1990).

It is clear that Customs Regulation 191.141(h) does not expressly require that the drawback claimant must be the exporter of the substituted merchandise. Instead, the regulation only requires that a "legal person X" possesses both the imported merchandise and the substituted merchandise "during the same or different time interval in period A." According to the regulation, "[p]eriod A * * * begins when X receives the merchandise and ends three years after the importation of said merchandise."

In addition, Customs' interpretation of the regulation is disputed by the affidavit of George C. Steuart, which was submitted by the plaintiff. In his affidavit, Mr. Steuart, the former Chief of the Drawback and Bonds Branch of the Customs Service, stated that he was responsible for drafting Customs Regulation 191.141(h). Mr. Steuart stated that the regulations for substitution same condition drawback were drafted "to ensure that both lots of merchandise would come into the possession of the same entity at some time between the importation of the designated merchandise and the export of the substituted merchandise." He added that "'[l]egal person X' was not intended to refer to the drawback claimant, and the regulations were not intended to add the requirement that a claimant of substitution same condition drawback possess both lots of merchandise."

In support of its contention, the defendant also cites Customs Regulation 191.73, which provides that:

(a) *Exporter; reservation by manufacturer or producer*. The person named as exporter on the notice of exportation or in bill of lading, air waybill, freight waybill, Canadian Customs manifest, cargo manifest, or certified copies of these documents, shall be deemed to be the exporter and entitled to drawback, unless the manufacturer or producer shall reserve the right to claim drawback. The manu-

facturer or producer who reserves this right may claim drawback, and he shall receive payment upon production of satisfactory evidence that the reservation was made with the knowledge and consent of the exporter.

(b) *Agent or person designated to receive drawback.* Drawback may be paid to the agent of the manufacturer, producer, or exporter, or to the person the manufacturer, producer, exporter, or agent directs in writing to receive drawback payment.

19 C.F.R. § 191.73 (1990).

There is a question, however, whether Customs Regulation 191.73 was intended to limit the persons entitled to substitution same condition drawback. Customs Regulation 191.73 is found in subpart G of part 191, and appears to be solely a procedural regulation, identifying which person will receive payment from Customs. Instead, the substantive regulations on substitution same condition drawback are contained in subpart N, which is entitled "Same Condition and Rejected Merchandise Drawback."

In view of the statutory language enacted by Congress and the legislative history, the court concludes that, in enacting section 1313(j)(2), Congress did not intend to require that a claimant of substitution same condition drawback must be the exporter of the substituted merchandise.

Conclusion

It is the conclusion of the court that, in denying the plaintiff substitution same condition drawback, the Customs Service acted illegally and in violation of its statutory authority. Hence, the action of the Customs Service must be vacated. Since it is not disputed that the plaintiff has satisfied the other requirements for drawback, plaintiff is entitled to drawback.

Accordingly, plaintiff's motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied.

(Slip Op. 91-19)

Former Employees of Boise Cascade Corp., plaintiffs *v.* U.S. Secretary of Labor, defendant

Court No. 90-08-00443

[Plaintiffs' motion for judgment upon the administrative record denied.]

(Decided March 20, 1991)

Walter Fahlenkamp, pro se, for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Vanessa P. Sciarra*), *Scott Glabman,* United States Department of Labor, of counsel, for defendant.

OPINION

RESTANI, *Judge*: Walter Fahlenkamp, on behalf of the former employees of Boise Cascade Corporation, filed this action appealing a final determination by the Secretary of Labor denying certification for trade adjustment assistance benefits under 19 U.S.C. § 2272 (1988). Plaintiffs move for judgment on the agency record pursuant to Rule 56.1 of the Rules of this court. For the following reasons the court finds the agency determination to be supported by substantial evidence contained in the administrative record and therefore, plaintiffs' motion is denied.

BACKGROUND

On May 4, 1990, Michael H. Pieti petitioned the Department of Labor ("Labor") on behalf of former employees of Boise Cascade Corporation ("Boise Cascade") for certification of eligibility for trade adjustment assistance benefits. The petition covered former workers of the Goldendale and Yakima, Washington, sawmill facilities of Boise Cascade. Until it was closed in December of 1989, the Goldendale plant produced softwood lumber. The Yakima facility produced both softwood lumber and softwood plywood. Petitioners argued that they were eligible for trade adjustment assistance because their unemployment was caused by increased imports of softwood lumber products.[1] As support for their contention, petitioners referenced Labor to materials from a previous investigation of the same two facilities, TA-W-23,687 (Goldendale) and TA-W-23,688 (Yakima).[2]

On May 14, 1990, Labor initiated an investigation with regard to workers at these plants. During this investigation, Labor obtained information confirming that sales and production of softwood lumber produced by the two facilities increased in 1989 as compared to 1988, but declined in the January to April period of 1990 as compared to the same period in 1989. Record at 46, 49-50. Boise Cascade provided Labor with a list of several major customers who purchased lumber from the company during the relevant time period. These customers represented over 26 percent of the corporate-wide sales decline of softwood lumber in the first four months of 1990. Record at 47. In responding to a telephone survey, none of the customers reported increasing their purchases of imported softwood lumber while decreasing their purchases from Boise Cascade. *See* Record at 60-65.

Based on this information, Labor denied plaintiffs' petition for certification of eligibility on July 26, 1990. Record at 68-69. Labor stated that

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[1] Petitioners expressly stated that they were "petitioning only soft wood lumber impacted workers," Administrative Record ("Record") at 12, and therefore, the workers of the Yakima plant who engaged in the manufacture of plywood were not covered by the petition.

[2] This earlier investigation, commenced by a petition dated March 5, 1990, ended on February 2, 1990 when Labor denied trade adjustment assistance. The denial was based on declining United States imports of softwood lumber and softwood plywood. Notice of this denial was published in the *Federal Register* on March 8, 1990. See Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 55 Fed. Reg. 8,615.

[3] Mrs. Fahlenkamp wrote two letters to Labor requesting answers to various questions concerning the negative determination and the procedures to appeal the determination. *See* Record at 70-71, 73-74. Labor responded with two letters detailing the appeal process and the reasons for the negative finding. *See* Record at 72, 75.

the third criterion of 19 U.S.C. § 2272(a) was not met. Specifically, United States imports of softwood lumber *decreased* absolutely in 1989 as compared to 1988 and the customer survey revealed that several major customers, accounting for a large percentage of Boise Cascade's sales decline, had not increased their purchases of imported lumber during the relevant time period. *Id.* at 69. Notice of this negative final determination was published in the *Federal Register* on August 9, 1990. *See* Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 55 Fed. Reg. 32,503.

After an exchange of letters between Betty Fahlenkamp (wife of one of the petitioners, Walter Fahlenkamp) and Labor,[3] petitioners sent a letter to the Clerk of this court which was deemed a summons and complaint filed on August 30, 1990. Labor responded with an answer filed November 26, 1990. The Clerk of this court accepted plaintiffs' letter of December 24, 1990 as a motion for judgment on the agency record filed on January 8, 1991.

Discussion

This court has jurisdiction to review any final determination of the Secretary of Labor under § 223 of the Trade Act of 1974, 19 U.S.C. § 2273. *See* 28 U.S.C. § 1581(d)(1)(1988). The court will review the final agency determination to decide whether it is supported by substantial evidence contained in the administrative record, and is in accordance with law. 19 U.S.C. § 2395(b)(1988). Substantial evidence is defined as more than a "mere scintilla," but sufficient evidence to reasonably support a conclusion. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (1987).

As noted earlier, a group of workers whose unemployment is caused by imports may be eligible to apply for adjustment assistance if the Secretary of Labor determines, after investigation, that the three criteria under 19 U.S.C. § 2272 are met. The statute provides that:

> (a) The Secretary shall certify a group of workers * * * as eligible to apply for adjustment assistance under this part if he determines-
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272 (1988). Worker adjustment assistance will be granted provided the petitioners meet each of the three requirements.

In this case, Labor determined that petitioners did not meet the third criterion. Several findings support this decision. First, evidence con-

tained in the record indicates that United States imports of softwood lumber decreased absolutely in 1989 as compared to 1988. Record at 45. Thus, the record supports the conclusion that the statutory requirement that imports be "increasing," was not met. Second, the telephonic customer survey[4] clearly indicates that the major customers did not cut back on their softwood lumber purchases from Boise Cascade while increasing their purchases of imports. Accordingly, substantial evidence exists supporting Labor's conclusion that the imports did not contribute importantly[5] to petitioners' separations.

A case for worker adjustment assistance based on increased imports was not made because the record before Labor did not reveal both increased imports of the subject product and a causal connection between the imports and the separations. If the record evidence is not sufficient to support an affirmative finding on both factors, then Labor must deny the certification petition, as it did here. In their letter-Rule 56.1 motion, plaintiffs do not directly challenge either of Labor's findings. Rather they argue that the lay offs at the Yakima plant and the closure of the Goldendale facility should be considered separately, that Labor did not adequately investigate the amount of softwood lumber imports, and that extra record information indicates that Boise Cascade was unable to place competitive timber bids.

As to the first argument, Labor properly concluded that the two facilities were sufficiently related and that they could be investigated together, without prejudice to any of the workers. *See* Record at 47. The record indicates that the marketing of softwood lumber by both of the sawmills was tied together and that the separations at both could be consolidated in the investigation. See Record at 49-50. Plaintiffs have not provided the court with any information which would cast doubt upon Labor's[6]decision to consider the two sawmills together.

Plaintiffs' assertion that Labor did not adequately investigate the amounts of softwood lumber imports is likewise unpersuasive. Labor *did* examine the level of imports and concluded that they were decreasing. The evidence used by Labor to support its determination clearly shows that imports decreased from 1988 to 1989 (13.8 billion board feet in 1988 to 13.6 billion board feet in 1989). *See* Record at 45. Viewed in terms of imports relative to domestic production, the figures for 1988

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[4] This court has recognized, in cases other than those involving deceptive labelling, that a customer survey is a "reasonable means of ascertaining the existence of a causal nexus between increased imports and a firm's lost sales, and the resulting separation of its employees." *Retail Clerks Int'l Union v. Donovan*, 10 CIT 308, 312 (1986) (citing *Local 167, Int'l Molders and Allied Workers' Union v. Marshall*, 643 F.2d 26, 30 (1st Cir. 1981)).

[5] Congress has defined the term "contributed importantly" to mean "a cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1) (1988).

[6] The court also notes that plaintiffs stated to Labor that the Goldendale closure *caused* fifteen salaried positions to be eliminated at the Yakima sawmill. Record at 51. Clearly plaintiffs were aware of the close connection between the two facilities.

and 1989 are very close (36.2% in 1988 and 36.6% in 1989). *See* Record at 45.[7]

Lastly, plaintiffs reference material which was not before Labor in an attempt to prove that imports of softwood lumber harmed Boise Cascade. The court will not consider this information because it was not before Labor when it rendered its final determination.[8]

Conclusion

After review of the record, the court concludes that the agency determination is supported by substantial evidence in the administrative record. The record reveals that United States imports of softwood lumber decreased absolutely between 1988 and 1989. The customer survey provided Labor with a sufficiently accurate picture of the factors underlying Boise Cascade's lost sales. Significantly, none of the contacted customers identified imports as being a cause behind their decision to cut back on purchases from Boise Cascade and none of the respondents reported an increase in their imports. Plaintiffs' argument that "Without imports, the U.S. softwood mills could better control the market to meet their expenses," Plaintiffs' Brief at 2, while undoubtedly a true statement, serves as an indicator that plaintiffs have misunderstood the nature of the trade adjustment assistance program as implemented by statute. Congress enacted a statute which provides relief *only* when a causal connection between increased import penetration and worker separations can be found. The statute does not address the issue of imports which are not increasing and have not caused the separations, regardless of how sympathetic the regional employment environment might appear.

Accordingly, plaintiffs' motion for judgment on the agency record is denied.

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[7] Plaintiffs argue that evidence from the previous investigation indicates that the imports were at a higher level in 1989 than in 1988 . The court finds that plaintiffs' contention is easily dismissed because in the investigation at issue in this case, Labor used data which had been updated as of April 30, 1990, whereas plaintiffs cite to data from the previous investigation compiled in October 1989. *Compare* Record at 25 *with* Record at 45. Plaintiffs ignore the fact that Labor used the newer, updated version of the data in making its determination and therefore, Labor's import figures are the relevant ones in this determination.

[8] The court notes that even if the extra record information had been before Labor, the same conclusion would have been reached. Plaintiffs argue that the Goldendale facility was not closed because of restricted timber sales on federal lands, as Labor had stated in its previous determination. *See* Record at 82. Rather, plaintiffs baldly contend that the reason for the closure was that Boise Cascade was simply unable to bid competitively due to imports of softwood lumber. As proof of this contention, plaintiffs submit a list of "Sawmill Statistics." This list purports to show unsuccessful bids for timber by Boise Cascade in 1989 to supply the Goldendale facility, apparently indicating instances where Boise Cascade was unable to bid competitively against other companies. Even if this list had been before Labor, its only relevance is in proving that Boise Cascade did not win certain bids. From this list, the court cannot ascertain import increases or a causal relationship between imports and the separations. The list merely indicates that Boise Cascade did indeed lose certain bids for timber in 1989, an unfortunate occurrence perhaps, but not one that the court may simply attribute to increased imports.

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